Abdul Rahman bin Suhaimi v Public Prosecutor

HIGH COURT (IPOH) — CRIMINAL APPEAL NO 42A-8 OF 2007
CHOONG SIEW KHIM JC
12 MARCH 2011

Criminal Law — Anti-Corruption Act 1997 — s 10(a)(bb) — Police officer corruptly receiving protection money — Appeal against conviction and sentence — Prosecution adducing overwhelming evidence against accused — Whether trial judge rightly invoked presumption under s 42 — Whether corrupt intention by accused shown — Defence of mere denial — Failure to rebut s 42 presumption — Whether defence amounted to innocent explanation

Criminal Law — Penal Code — s 34 — Common intention — Corruption — Accused charged alone despite s 34 being referred to in the charge — Whether occasioned miscarriage or failure of justice — Whether accused fully appreciated nature of prosecution case without implicating any other person — Whether inclusion of s 34 rendered charge bad

Criminal Procedure — Sentencing — Concurrent or consecutive — Accused convicted of three charges of corruption — Offences under second and third charges were follow-up from first charge and closely tied up — One transaction involving continuity of action and purpose — Accused deprived of retirement benefits — Whether concurrent sentence sufficient enough for punishment, retribution and deterrence

Evidence — Witness — Credibility of — Whether witness was accomplice — Witness playing active role in entrapping accused on instructions of BPR officers — Whether witness was more of agent provocateur than accomplice — Whether witness was particeps criminis or had requisite mens rea — Whether corroboration required

The appellant, who was the Head of Traffic IPD Teluk Intan at the material time, was charged and convicted of three counts of corruption under s 10(a)(bb) of the Prevention of Corruption Act, 1997 ('Act') read together with s 34 of the Penal Code and punishable under s 16 of the Act. He was alleged to have received protection monies so as not to take action for road traffic offences against lorries belonging to one Aini bin Imran ('SP3'). The events leading to the charges started off with demands for protection money

made on the complainant (SP3) by members of the MPV unit (mobile police vehicle unit) relating to the lorries. Arrangements were made through one Azizan bin Abas (who was not called by the prosecution but offered to the defence at the end of the prosecution case) from the traffic unit to meet the accused. The appellant was found guilty and convicted of the three charges. He was sentenced to two years imprisonment together with a RM10,000 fine on each charge with the imprisonment terms to run consecutively. Hence this appeal against the conviction and sentence.

Held, dismissing the appeal against conviction and allowing the appeal against sentence:

(1) SP3 played an active role in entrapping the accused on the instructions of the BPR officers (although the accused did not solicit in contrast to the MPV personnel who had demanded payment). SP3 was more of an agent provocateur than accomplice. In the case of a witness giving the bribe, as was the case with SP3, the rule is not whether he is a particeps criminis or he has the requisite mens rea. If he is not or has not, be he a payer or a receiver, he cannot be an accomplice. Whether a payer or a receiver is an accomplice depends entirely upon the facts of each particular case; *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379 referred (see para 9).

(2) SP3 made himself an agent for the prosecution for the purpose of disclosing corrupt practices and in the case involving the accused, it was before the actual perpetration of the offence and hence SP3's evidence did not require corroboration of the kind required of an accomplice. SP3's evidence in any event was held by the trial judge to have been amply corroborated by other witnesses as well as tape recordings, transcripts and photographs. The prosecution had adduced overwhelming evidence against the accused (see para 14).

(3) The learned trial judge rightly went on to invoke the presumption under s 42 of the Act. The evidence clearly indicated the corrupt intention shown by the accused which culminated in the payment of RM400 on 24 December 1999 and RM500 on 24 January 2000. These two payments were consistent with the accused's agreement on 20 December 1999 for a lump sum payment of six months (see para 18).

(4) There was overwhelming and convincing evidence adduced by the prosecution as found by the trial judge after her assessment of the evidence. The trial judge hence did not err when she found that the defence, being one of mere denial, was not probably true and therefore failed to rebut the s 42 presumption. Neither did the defence amount to an innocent explanation which the court could consider more likely than not to be true; *Thavanathan Balasubramaniam v Public Prosecutor* [1997] 3 CLJ 150 referred (see para 20).

(5) It is entirely within the discretion of the public prosecutor who to charge for the commission of an offence. The appellant was the only one indicted on the first charge. The inclusion of s 34 did not occasion any miscarriage or failure of justice against the accused. From the line of defence taken by the accused in the instant case, it was clear that he fully appreciated the nature of the prosecution case without implicating Azizan or any other person. The inclusion of s 34 in the first charge did not render the charge bad as it did not affect the nature and essence of the charge against the accused based on the evidence adduced against him; *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314 referred (see para 21).

(6) The offences under the second and third charges were a follow-up from the first charge and being closely tied up as to amount to one transaction involving continuity of action and purpose, the circumstances warranted substitution of the consecutive sentences with that of concurrent. The appellant would have been totally deprived of all his benefits and entitlements upon his conviction and at the time of conviction, he was already aged 49, almost near to retirement. The concurrent imprisonment sentences of two years each would be sufficient enough punishment and retribution to the appellant besides sending a strong deterrent signal to other would-be offenders of the same mind (see para 29).

[Bahasa Malaysia summary

Perayu, yang merupakan Ketua IPD Trafik Teluk Intan pada masa material, dipertuduh dan disabitkan dengan tiga kesalahan rasuah di bawah s 10(a)(bb) Akta Pencegahan Rasuah 1997 ('Akta') dibaca bersama s 34 Kanun Keseksaan dan boleh dihukum di bawah s 16 Akta tersebut. Dia didakwa menerima wang perlindungan supaya tidak mengambil tindakan bagi kesalahan jalanraya terhadap lori-lori yang dimiliki oleh seorang yang bernama Aini bin Imran ('SP3'). Kejadian yang membawa kepada pertuduhan tersebut bermula dengan tuntutan untuk wang perlindungan dibuat kepada pengadu (SP3) oleh ahli-ahli unit MPV (unit polis bergerak) berkaitan dengan lori-lori tersebut. Perancangan dibuat melalui seorang bernama Azizan bin Abas (yang tidak dipanggil oleh pihak pendakwaan tetapi ditawarkan kepada pembelaan di akhir kes pendakwaan) daripada unit trafik untuk berjumpa dengan tertuduh. Perayu didapati bersalah dan disabitkan atas ketiga-tiga pertuduhan. Dia dihukum penjara dua tahun dan denda sebanyak RM10,000 bagi setiap pertuduhan dengan tempoh penjara berjalan secara berturutan. Justeru, rayuan ini terhadap sabitan dan hukuman.

Diputuskan, menolak rayuan terhadap sabitan dan membenarkan rayuan terhadap hukuman:

(1) SP3 memainkan peranan aktif dalam memerangkap tertuduh atas arahan

pegawai-pegawai BPR (walaupun tertuduh tidak meminta rasuah berbanding ahli MPV yang telah menuntut bayaran). SP3 adalah lebih kepada agen perangkap daripada rakan sejenayan. Dalam kes saksi memberikan rasuah, seperti kes SP3, peraturannya bukan sama ada dia particeps criminis atau dia mempunyai mens rea yang diperlukan. Jika dia bukan atau tidak ada, sama ada dia pemberi atau penerima, dia tidak boleh menjadi rakan sejenayah. Sama ada seseorang pemberi atau penerima adalah rakan sejenayah bergantung sepenuhnya kepada fakta kes tersebut (lihat perenggan); *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379 dirujuk (lihat perenggan 9).

(2) SP3 menjadikan dirinya agen kepada pihak pendakwaan bertujuan untuk mendedahkan amalan rasuah dan di dalam kes yang melibatkan tertuduh, ia adalah sebelum perlakuan sebenar kesalahan tersebut dan dengan itu keterangan SP3 tidak memerlukan sokongan seperti yang diperlukan bagi rakan sejenayah. Keterangan SP3 walau bagaimanapun diputuskan oleh hakim bicara sebagai telah banyak disokong oleh saksi-saksi lain dan juga pita rakaman, transkrip dan gambar-gambar. Pihak pendakwaan telah mengemukakan keterangan yang banyak terhadap tertuduh (lihat perenggan 14).

(3) Hakim perbicaraan yang bijaksana secara betul telah membangkitkan anggapan di bawah s 42 Akta. Keterangan jelas menunjukkan niat menerima rasuah ditunjukkan oleh tertuduh yang berakhir dengan bayaran sebanyak RM400 pada 24 Disember 1999 dan RM500 pada Januari 2000. Kedua-dua bayaran ini adalah konsisten dengan perjanjian tertuduh pada 20 Disember 1999 untuk bayaran sekaligus selama enam bulan (lihat perenggan 18).

(4) Terdapat keterangan yang banyak dan meyakinkan yang dikemukakan oleh pihak pendakwaan seperti yang didapati oleh hakim perbicaraan selepas penilaian keterangan. Hakim perbicaraan oleh itu tidak terkhilaf apabila mendapati bahawa pembelaan tersebut, sebagai penafian semata-mata, tidak kemungkinan benar dan dengan itu gagal mematahkan anggapan s 42. Juga pembelaan tersebut tidak membentuk penjelasan tidak bersalah yang boleh dipertimbangkan oleh mahkamah sebagai berkemungkinan besar tidak benar (lihat perenggan 20); *Thavanathan Balasubramaniam v Public Prosecutor* [1997] 3 CLJ 150 dirujuk.

(5) Adalah secara keseluruhannya dalam budi bicara pendakwa raya siapa yang perlu dipertuduh kerana melakukan sesuatu kesalahan. Perayu merupakan satu-satunya yang didakwa atas pertuduhan pertama. Pemasukan s 34 tidak menyebabkan ketidakadilan terhadap tertuduh. Daripada pembelaan yang dibuat oleh tertuduh di dalam kes ini, jelas bahawa dia menghargai sepenuhnya sifat kes pihak pendakwaan tanpa membabitkan Azizan atau orang lain. Pemasukan s 34 di dalam

pertuduhan pertama tidak menjadikan pertuduhan tersebut cacat kerana ia tidak menjejaskan sifat dan intipati pertuduhan terhadap tertuduh berdasarkan kepada keterangan terhadapnya (lihat perenggan 21) *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314 dirujuk.

(6) Kesalahan-kesalahan di bawah pertuduhan kedua dan ketiga adalah lanjutan daripada pertuduhan pertama dan oleh sebab berkait rapat sehingga membentuk satu transaksi yang melibatkan tindakan dan niat yang berkesinambungan, hal keadaan mewajarkan penggantian hukuman berturutan dengan yang serentak. Perayu akan dinafikan keseluruhan faedah dan haknya atas sabitannya dan pada masa sabitan, dia telahpun mencapai umur 49 tahun, hampir kepada persaraan. Hukuman penjara serentak selama setiap dua tahun adalah hukuman dan balasan yang mencukupi kepada perayu di samping memberikan isyarat pencegahan yang kuat kepada pelaku salah dengan niat yang sama pada masa akan datang (lihat perenggan 29).]

Notes

For a case on bribery in general, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) para 22.

For cases on concurrent or consecutive, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3669–3712.

For cases on credibility of, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3029–3086.

For cases on s 34 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1527–1548.

Cases referred to

Bachik Abdul Rahman v PP [2004] 2 CLJ 572, CA (refd)
Msimanga Lesaly v PP [2005] 4 MLJ 314, CA (refd)
Ng Kok Lian & Anor v PP [1983] 2 MLJ 379; [1983] CLJ (Rep) 293, FC (refd)
PP v Ishak Hj Shaari & Other Appeals [2003] 4 MLJ 583; [2003] 3 CLJ 843, CA (refd)
Shaiful Idzam Sulaiman v PP [2004] 2 CLJ 121, HC (refd)
Teja Singh & Mohamed Nasir v PP [1950] 1 MLJ 71 (refd)
Thavanathan Balasubramaniam v PP [1997] 3 CLJ 150, FC (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2001] 1 CLJ 381, FC (refd)
Sathasivam and 2 others v PP [1949] 1 MLJ 102 (refd)

Legislation referred to

Anti-Corruption Act 1997 ss 10(a)(bb), 42, 44
Criminal Procedure Code s 422
Penal Code s 34

Abdul Roni bin Abd Rahman (Abdul Roni & Co) for the appellant.
Saiful Hazmi bin Mohd Saad (Deputy Public Prosecutor) for the respondent.

Choong Siew Khim JC:

[1] The appellant, who was the Head of Traffic IPD Teluk Intan at the material time, was charged and tried at the Sessions Court, Teluk Intan, on these three counts:

Pertuduhan Pertama

Bahawa kamu pada 20 Disember 1999, lebih kurang jam 8.35 malam, di sebuah kedai Diwanis Tomyam, Kampung Bahagia, dalam Daerah Teluk Intan, di dalam Negeri Perak, sebagai Ketua Cawangan Trafik Polis DiRaja Malaysia yang bertugas di Ibu Pejabat Polis Daerah (IPD) Teluk Intan, Perak, telah secara rasuah bersetuju untuk menerima satu suapan sebanyak *RM900.00* daripada seorang *Aini bin Imran*, untuk anggota-anggota Cawangan Trafik, IPD Teluk Intan, sebagai suatu dorongan untuk tidak melakukan suatu perbuatan yang dicadangkan akan berlaku, yang mana ia melibatkan suatu Badan Awam, iaitu, Polis DiRaja Malaysia, iaitu, *sebagai bayaran untuk memberi perlindungan bagi enam bulan kepada tiga buah lori milik Aini bin Imran sekiranya melakukan kesalahan-kesalahan lalulintas,* dengan itu kamu telah melakukan kesalahan di bawah seksyen 10(a)(bb) Akta Pencegahan Rasuah 1997 (Akta 575) dengan dibaca bersama seksyen 34 Kanun Keseksaan dan boleh dihukum di bawah seksyen 16 Akta yang sama.

Pertuduhan Kedua

Bahawa kamu pada 24 Disember 1999, lebih kurang jam 1.08 tengahari, di tempat letak kereta, Pasar Teluk Intan, dalam Daerah Teluk Intan, di dalam Negeri Perak, sebagai ejen Kerajaan Malaysia, iaitu, sebagai Ketua Cawangan Trafik Polis DiRaja Malaysia di Ibu Pejabat Polis Daerah (IPD) Teluk Intan, Perak, telah secara rasuah menerima satu suapan, iaitu wang tunai *RM400.00* daripada seorang *Aini bin Imran*, untuk anggota-anggota Cawangan Trafik IPD Teluk Intan, sebagai suatu dorongan untuk tidak melakukan suatu perbuatan yang dicadangkan akan berlaku yang mana ia melibatkan suatu Badan Awam, iaitu, *sebagai pendahuluan untuk bayaran perlindungan selama enam bulan kepada tiga buah lori milik Aini bin Imran sekiranya melakukan kesalahan-kesalahan lalulintas,* dengan itu kamu telah melakukan kesalahan di bawah seksyen 10(a)(bb) Akta Pencegahan Rasuah 1997 (Akta 575)(Akta 575) dan boleh dihukum di bawah seksyen 16 Akta yang sama.

Pertuduhan Ketiga

Bahawa kamu pada 24 Januari 2000, lebih kurang jam 1.00 tengahari, di Gerai Makan Asmah, Kampong Bahagia, dalam Daerah Teluk Intan, di dalam Negeri Perak, sebagai ejen Kerajaan Malaysia, iaitu, sebagai Ketua Cawangan Trafik Polis DiRaja Malaysia di Ibu Pejabat Polis Daerah (IPD) Teluk Intan, Perak, telah secara rasuah menerima satu suapan, iaitu wang tunai RM500.00 daripada seorang *Aini bin Imran*, untuk anggota-anggota Cawangan Trafik IPD Teluk Intan, sebagai suatu dorongan untuk tidak melakukan suatu perbuatan yang dicadangkan akan berlaku yang mana ia melibatkan suatu Badan Awam, iaitu, Polis DiRaja Malaysia, iaitu, *baki bayaran untuk bayaran perlindungan selama enam bulan kepada tiga buah lori milik Aini bin Imran sekiranya melakukan kesalahan-kesalahan lalulintas*, dengan itu

kamu telah melakukan kesalahan di bawah seksyen 10(a)(bb) Akta Pencegahan Rasuah 1997 (Akta 575) dan boleh dihukum di bawah seksyen 16 Akta yang sama.

[2] He was found guilty and convicted of the three charges. He was sentenced to two years imprisonment together with a RM10,000 fine on each charge with the imprisonment terms to run consecutively. His appeal is against conviction and sentence.

[3] The learned sessions judge set out extensively and in detail in her grounds of judgment the facts of the case and the salient evidence adduced which she held made out a prima facie case against the appellant on the three charges. Reference was made to that (pp 300–339 of the appeal record). In a nutshell, the events leading to the charges started off with demands for protection money ('wang tutup mata') made on the complainant Aini bin Imran (SP3) by members of the MPV unit (mobile police vehicle unit) related to lorries belonging to his employer which operated in the Langkap area for the transportation and disposal of rubbish in the event traffic offences were committed in the course of such work. The payments were to prevent the issuance of traffic summonses. For the said purpose to avoid summonses from the traffic unit (the MPV and the traffic units were under the supervision of the accused who was then the head of the traffic and public order department of the District Police Headquarters of Hilir Perak, Teluk Intan), arrangements were made through one Azizan bin Abas (who was not called by the prosecution but offered to the defence at the end of the prosecution case) from the traffic unit to meet the accused. The first meeting was on 20 December 1999 as per the first charge following which it was agreed that a lump sum of RM900 was to be paid for three lorries at a rate of RM50 per lorry for a period of six months. Subsequent to that, RM400 was paid to the accused by SP3 on 24 December 1999 ('the second charge') with the balance of RM500 paid on 24 January 2000 ('the third charge').

[4] Based on the petition of appeal and the submissions of learned counsel for the appellant, three main issues pertaining to the finding of conviction were raised. It was firstly contended that based on the evidence adduced, there was no request or solicitation that initiated from the accused and thus the trial judge had erred by finding that he had solicited for the gratification. It was alleged that it was SP3 who had wanted to meet the accused and not vice versa. There was no doubt about this but having read the notes of proceedings and assessed the evidence in totality, I was inclined to disagree with learned counsel on this point because he had, in my view, overlooked there was adequate evidence within the context of the first charge pertaining to the fact that the accused 'agreed to accept'. Solicitation was not an ingredient of the charge.

[5] Following the meeting and discussion on 20 December 1999, there was

clearly agreement on the part of the accused to accept payment from SP3 who eventually paid the sum to the accused in two parts of RM400 and RM500 respectively. A perusal of transcript P27B and the flow of conversation between SP3, Azizan and the accused evidently showed there was a form of haggling on the amount to be paid which culminated in the accused stating that it would be easier to pay in a lump sum and ended with SP3 saying these words:

> Aku bagi kamu berapa? Kalau seratus 150, kalau enam bulan. Ya Zan seratus sembilan ratus tuan, tuan Azizan minta serbu. Ha…ha...

[6] Earlier to this, the accused had said:

> Dak kami, Dak kami orang, ikut satu biji lima puluh tak kurang.

(Note: Suara 1 refers to SP3 and Suara 3 refers to the accused in transcript P27B).

[7] As stated earlier, three lorries were involved making a sum of RM150 in total at the rate of RM50 for one lorry. The conversation on 20 December 1999 concluded with an agreement to fix the payment at RM50 for one lorry and payable in a lump sum. It was obvious too from the transcript that the accused did not decline at all to accept payment by and from SP3.

[8] Going on to the next inter-linked issue that SP3 played an active role in entrapping the accused on the instructions of the BPR officers (although the accused did not solicit in contrast to the MPV personnel who had demanded payment), it was argued that SP3 was an accomplice by virtue of his role and hence the learned sessions judge ought not to have decided that SP3 was protected under the provisions of s 44 of the Anti-Corruption Act. Even though the sessions judge did not specifically find whether the accused was an accomplice or otherwise, again from my appraisal of the notes of evidence I would venture to state that SP3 was more of an agent provocateur than accomplice.

[9] I was guided by the Federal Court decision in *Ng Kok Lian & Anor v Public Prosecutor* [1983] 2 MLJ 379; [1983] CLJ (Rep) 293. Although this case touched on whether a witness alleging that he had been given gratification by the accused is, prima facie, an accomplice, the same rationale applies if the witness is a payer. An examination of his evidence is paramount before finding whether he is an accomplice or not. In the case of a witness giving the bribe, as was the case with SP3, the rule as laid down in *Ng Kok Lian & Anor v Public Prosecutor* is not whether he is a particeps criminis or he has the requisite mens rea. If he is not or has not, be he a payer or a receiver, he cannot be an accomplice. Whether a payer or a receiver is an accomplice depends entirely upon the facts of each particular case.

[10] Heliliah Mohd Yusof J (as she then was) in *Shaiful Idzam Sulaiman v Public Prosecutor* [2004] 2 CLJ 121 had occasion to consider facts along the same line and after reference to various authorities that differentiated an accomplice from an agent provocateur/spy/decoy/informer, she held that the complainant was not an accomplice but a partisan witness having reported to the Anti-Corruption Agency besides being an informer who had participated in leading to the corrupt payment.

[11] The statement of law on this same point was followed by Spenser Wilkinson J in *Teja Singh & Mohamed Nasir v Public Prosecutor* [1950] 1 MLJ 71 after he considered the following:

> I think the law is correctly stated in the case of *Emperor v Chaturbhuj Sahu* where the head note reads as follows:
>
> A person who makes himself an agent for the prosecution with the purpose of discovering and disclosing the commission of an offence, either before associating with wrong doers or before the actual perpetration of the offence is not an accomplice but a spy, detective or decoy whose evidence does not require corroboration, though the weight to be attached to it depends on the character of each individual witness in each case. But a person who is associated with an offence with a criminal design, and extends no aid to the prosecution till after its commission is an accomplice requiring corroboration.

[12] It was also held in *Sathasivam and 2 others v Public Prosecutor* [1949] 1 MLJ 102 that a witness who has made himself an agent for the prosecution before the actual commission of the offence is not an accomplice.

[13] In the instant case, SP3 reported to the Anti-Corruption Agency about what was amiss at the traffic department of IPD Teluk Intan in relation to traffic police closing their eyes to offences if payments were made to them. The MPV unit jump-started the whole thing (see P4). SP3 made himself an agent for the prosecution for the purpose of disclosing corrupt practices and in the case involving the accused, it was before the actual perpetration of the offence and hence SP3's evidence did not require corroboration of the kind required of an accomplice.

[14] SP3's evidence in any event was held by the trial judge to have been amply corroborated by witnesses SP5, SP6, SP7, SP8, SP10 and SP13 as well as tape recordings P27–P30, transcripts P27B, P28B, P29A and P30A and photographs P2. She added that the prosecution had adduced overwhelming evidence against the accused and I saw no justifiable reason to digress from that. Section 44 of the Anti-Corruption Act is also the lynch-pin for the prosecution.

[15] The appellant further took issue that the two photographs P16A and B which show where the RM500 was recovered from (as per third charge) was a mere re-enactment ('lakaran semula'), with the photographs taken after the money was found from the dashboard of the Pajero. According to SP13, the money was placed back from where it was found before the photographs were taken. Since the money was not recovered from the accused himself (the money was recovered from the glove compartment), it was submitted that a reasonable doubt had been raised that the accused had received the said money.

[16] It was my view however that this was a futile argument since evidence of the transaction of the handing over of RM500 to the accused who accepted it on 24 January 2000 at Gerai Makan Asmah was based on the consistent testimony of SP3 and SP5 (a BPR officer posing as SP3's wife) who were credibly corroborated by evidence adduced particularly from SP2, SP7, SP8 and SP10 who were at the scene. Photographs P2A–Z and P2AA–AE indisputably show the sequence of the incident.

[17] Over and above this, the serial numbers of the recovered money (P12) tallied with the serial numbers noted in the marked notes list (P11) which was signed by SP5 who received the money from SP13 before the meeting with the accused at Gerai Makan Asmah. The accused and Azizan came to the food-stall in the Pajero as shown in P2AD and AE. SP5 was the one who put the RM500 inside the fold of P7 (which belonged to the accused) before it was given to the accused who accepted and held it in his left hand before getting up to leave. It was to me erroneous to therefore submit that it was doubtful whether the accused had received and accepted the payment.

[18] The learned trial judge rightly went on to invoke the s 42 presumption. In addition, the vein of the discussion on 20 December 1999 between the accused, SP3 and Azizan clearly indicated the corrupt intention shown by the accused which culminated in the payment of RM400 on 24 December 1999 and RM500 on 24 January 2000. These two payments were consistent with the accused's agreement on 20 December 1999 for a lump sum payment of six months.

[19] The essence of the defence was basically a denial of the first charge by the accused that there was a discussion about payment to prevent any action taken against SP3's lorries at Restaurant Diwanis or anything stated by him to SP3 for lump sum payments. It was also a denial by him that he accepted RM400 from SP3 pertaining to the second charge although he admitted that he met SP3 at the market. On the third charge, he did not deny he gave P7 to SP3 at his (SP3's) request. However he did not see SP3 or SP5 putting money inside P7. He did not examine what was inside P7 when he took it from the table. He denied that he placed the money together with P7 inside the Pajero's

dashboard. Although the RM500 (P12) was not found from the accused's body, there was prima facie evidence that he was seen holding in the grip of his left hand P12 and on reaching the Pajero which was parked outside the stall, he was seen partially seated on the front passenger seat in front of the dashboard with his right hand holding the dashboard. The testimony of SP7 and SP8 totally ruled out the possibility that someone else rather than the accused had placed the RM500 inside the dashboard. SP8 who arrested Azizan near the driver's door instructed Azizan to lock the pajero before proceeding to the rest house to conduct a search on them based on the expectation that the money was in the accused's possession. When the search was futile, they went back to the pajero where the accused showed the money in the dashboard. SP10 issued the search list P19 the significance of which the accused knew when he signed on the bottom left, being a senior police officer. Although no one witness actually saw the accused putting P7 with its contents P12 inside the glove compartment, these circumstances belied the denial of the accused.

[20] The crux of the matter anyhow is that money did pass from SP3 to the accused who accepted it and of this, there was overwhelming and convincing evidence adduced by the prosecution as found by the trial judge after her assessment of the evidence. The trial judge hence did not err when she found that the defence, being one of mere denial, was not probably true and therefore failed to rebut the s 42 presumption. Neither did the defence, in my view, amount to an innocent explanation which the court could consider more likely than not to be true (see *Thavanathan Balasubramaniam v Public Prosecutor* [1997] 3 CLJ 150.

[21] Although this matter was not relied on as a ground in the petition of appeal, it was somewhat of concern that s 34 was cited in the first charge when the accused was the only person charged for the offence. Section 34 of the Penal Code speaks for itself and according to learned counsel for the appellant, this was a fundamental error and illegality not curable under s 422 of the Criminal Procedure Code. Azizan who took part in the discussion on 20 December 1999 was not charged. Be that as it may, it is entirely within the discretion of the public prosecutor who to charge for the commission of an offence. The appellant was the only one indicted on the first charge. I believed this could not be brushed off as a typographical error going by the submission of the learned deputy. I was instead inclined to regard that the inclusion of s 34 did not occasion any miscarriage or failure of justice against the accused based on the Court of Appeal decision in *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314 where it was held that s 34 of the Penal Code did not create a substantive offence but was merely a rule of evidence to infer joint responsibility for a criminal act performed by a plurality of persons. From the line of defence taken by the accused in the instant case, it was clear that he fully appreciated the nature of the prosecution case without implicating Azizan or

any other person. The inclusion of s 34 in the first charge did not render the charge bad as it did not affect the nature and essence of the charge against the accused based on the evidence adduced against him.

[22] The sessions court judge referred to s 34 in this manner (at p 352 of the appeal record):

> Dengan demikian mahkamah ini berpendapat pihak pendakwa telah berjaya membuktikan tuduhan pertama iaitu kesalahan s 10(a)(bb) Akta Pencegahan Rasuah 1997 dibaca bersama s 34 Kanun Keseksaan tanpa keraguan yang munasabah.

[23] There was nothing in the first charge to suggest or infer joint responsibility and complicity, so there was obviously a misdirection here. However a conviction will be upheld despite a misdirection when the appellate court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction (see *Tunde Apatira & Ors v Public rosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381).

[24] Based on the foregoing, there was sufficient evidence to support the conviction under the first charge and the error has not occasioned a failure of justice (see *Public Prosecutor v Ishak Hj Shaari & Other Appeals* [2003] 4 MLJ 583; [2003] 3 CLJ 843 at p 862 where a misdirection on the standard of proof was curable under s 422 of the Criminal Procedure Code provided there was sufficient evidence to support the conviction).

[25] Ultimately there was no merit to the appeal against conviction on the three charges. The finding on conviction was consistent with the evidence.

[26] On the appeal against sentence basically on the two years imprisonment imposed on each charge to run consecutively, it was urged upon me that the consecutive terms were excessive. Without dispute from the respondent that the two payments on 24 December 1999 (RM400) and 24 January 2000 (RM500) were connected with the lump sum payment of RM900, I viewed the three charges to be very closely related and more precisely, the second and third charges were the consequence of the first charge where the accused agreed to accept the lump sum payment of RM50 per lorry.

[27] It was stated by the Court of Appeal in *Bachik Abdul Rahman v Public Prosecutor* [2004] 2 CLJ 572 at p 579:

> The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by the one transaction rule and

the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive (see *R v Saleem* (1964) Crim LR 482; *R v Walsh* (1965) Crim LR 248). For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88; *Amrita Lai Hazra v Emperor* 42 Cal 957; *Chin Choy v Public Prosecutor* [1955] MLJ 236).

[28] While the sessions court judge did not err in applying the right sentencing principles, I was nevertheless of the opinion that the offences under the second and third charges were a follow-up from the first charge and being closely tied up as to amount to one transaction involving continuity of action and purpose, the circumstances warranted me to acede to the appeal by substituting the consecutive sentences with that of concurrent. In deciding that the sentences should run concurrently being more appropriate and fair, I was also mindful that the appellant would have been totally deprived of all his benefits and entitlements upon his conviction and at the time of conviction, he was already aged 49, almost near to retirement.

[29] The concurrent imprisonment sentences of two years each would be sufficient enough punishment and retribution to the appellant besides sending a strong deterrent signal to other would be offenders of the same mind. Accordingly the appeal against sentence was allowed to this extent.

Appeal against conviction dismissed and appeal against sentence allowed.

Reported by Kanesh Sundrum